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Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The State of New York has a vital interest in protecting its citizens as well as its financial services industry from the regional protectionist banking provisions enacted by the Commonwealth of Massachusetts* and the State of Con-

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* Mass. Gen. Laws Ann. Ch. 167 A § 2 (West 1971 & Supp. 1984) (A101-102). (Numbers in parentheses refer to Petitioners' Appendix to the Petition for Certiorari.)

necticut* (collectively, the "New England Compact"). The challenged provisions prohibit bank holding companies which maintain their principal place of business in any state outside New England, including New York, from acquiring a bank in Massachusetts or Connecticut.

The proponents of the New England Compact have all but admitted that the primary purpose of their legislation is to exclude the large New York banks from participating in the banking business in New England. State Senator John A. Brennan, Jr., author of the Massachusetts statute, conceded that he was opposed to outside banks, particularly those located in "the big money center," acquiring New England banks. (A189). Similarly, Connecticut State Senator Sullivan urged the adoption of Connecticut's banking statute to prohibit "many of the large New York banks" from coming into Connecticut to "get our deposits" and to enable New England banks to "compete with the big money centers in New York and get stronger and stronger." (A159-160).

State Senator Sullivan's characterization of New York as the "big money center" is, in large part, correct. New York is the financial center of the United States. The financial services industry—comprised of banking, insurance, securities and related institutions—is one of New York's most important industries, employing more than one half million people. Indeed, financial services—and particularly banking—are to New York what corn is to Kansas, coal is to West Virginia and oil and cattle are to Texas.

The statutes at issue in this case apply to all New York banks even though New York's banking industry include approximately two hundred small or medium sized commercial

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* 1983 Conn. Act 83-411 (A97-A99).

banks. In fact, only eight of New York's banks are equal in size or larger than the largest bank in Massachusetts and only twelve are larger than the largest bank in Connecticut.* Moreover, almost all of the banks in New York are the same size or smaller than the average banks located in Massachusetts and Connecticut. Thus, two small banks located a few miles apart in rural areas and serving the same general population—one in upstate New York and the other in western Massachusetts—would not be permitted to merge. Similarly, two small or medium sized banks serving suburban communities—one headquartered in Fairfield County, Connecticut and the other headquartered in neighboring Westchester County, New York—would be prevented from combining. It is clear that, even in the absence of the New England Compact, the likelihood that any of the small or medium sized New York banks will take control over or centralize the New England banking system is very slight.

At the same time, the New England Compact encourages large banks in Massachusetts or Connecticut to gain greater financial control in the region. Under the New England Compact, a very large bank located in Boston would be permitted to acquire a small, local bank located in rural northwestern Connecticut, although the banks have neither geography nor economic interests in common. Similarly, the largest bank in Connecticut could merge with the largest bank in Massachusetts. And contrary to the stated purpose of the New England Compact, it is conceivable that the intervenor respondent Bank of New England will consolidate its already large holding in New England.

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* This information was derived from the "Consolidated Reports of Condition and Income" dated September 30, 1984 filed with the appropriate federal bank regulatory agency.

The New England Compact excludes all New York banks —large and small, upstate or downstate—from participating in the banking business in New England. This blanket prohibition harms New York banking institutions by depriving them of access to the New England banking market and harms the People of New York by denying them the improved services and lower costs that could result from the increased competition generated by interstate bank acquisitions. The State of New York has a vital interest in seeking to overturn protectionist regional statutes. Such laws will inevitably undermine a unified national banking structure at the expense of New York's citizens and in derogation of the will of Congress and the Founding Fathers.

ARGUMENT

REGIONAL PROTECTIONIST STATUTES, SUCH AS THE NEW ENGLAND COMPACT, OFFEND THE COMPACT AND COMMERCE CLAUSES OF THE CONSTITUTION BECAUSE THEY IMPERMISSIBLY BURDEN THE SOVEREIGN INTERESTS OF EXCLUDED STATES.

The New England Compact favors the interests of a few states in one region of the nation at the expense of all other states and, particularly, at the expense of financial centers like New York. The creation of this compact is wholly repugnant to the notion of equal states' rights inherent in our nation's scheme of cooperative federalism. *See, Virginia* v. *Tennessee,* 148 U.S. 503 (1893).

The purpose of the New England Compact is to exclude the major New York banks from participating in the New England banking market. Its effect, however, is more far-reaching. The compact arose out of fear that a free and

open market place would quickly result in the take-over of New England banks by the big money center banks located in New York. Nevertheless, there is little doubt that the creation of arbitrary geographical barriers by the New England Compact has nationwide implications that extend beyond New York's borders. Similar compacts enacted in other regions (*see* A37-38) would pose a serious threat to federal supremacy in banking regulation and to the continued cooperation among sister states.

For the reasons that follow, the New England Compact should be held invalid under the Compact and the Commerce Clauses, and New York's sovereign interests, and the similar interests of all other excluded states, in participating in interstate banking should be recognized and protected.

A. The New England Compact Violates the Compact Clause

The Compact Clause provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." On repeated occasions, this Court has refined the meaning of the general prohibition contained in the Compact Clause. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978); *New Hampshire* v. *Maine,* 426 U.S. 363 (1976); *Virginia* v. *Tennessee,* 148 U.S. 508 (1893); *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657 (1838). The principles developed in these cases establish that the New England Compact, in every respect, is precisely the type of agreement or compact which this Court has held to require explicit congressional approval.

Early decisions of this Court made it clear that the Compact Clause was intended to prevent individual states from combining to form compacts, without the consent of Con-

gress, to the detriment of the states excluded from such compacts. In *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833), Chief Justice Marshall wrote that the Compact Clause generally restrains "state legislation on subjects . . . in which the people of all the states feel an interest" because if a state enters into a compact with another state, "for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution."

Some years later, in a case involving a boundary dispute between the states of Florida and Georgia which was to be settled by a compact between these two states, this Court called the Compact Clause "one of the great safeguards of the rights and interests of the other States, and to prevent any compact or agreement between any two States which might affect injuriously the interests of the others." *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855). Similarly, in *Wharton* v. *Wise*, 153 U.S. 155 (1894), this Court found that the intent of the Articles of Confederation provision, later adopted in the Constitution as the Compact Clause, which provided that "no two or more states should enter into any treaty confederation or alliance whatever between them without consent of the United States in Congress assembled," was to "prevent any union of two or more states, having a tendency to break up or weaken the league between the whole. . . . " *Id.* at 167. These decisions reaffirmed the principles advanced by the Framers of the Constitution—that the concept of a United States comprised of a supreme federal government and the several equal states would be meaningless if the individual states remained free to band together for their mutual benefit and to the detriment of the Union and the other states.

The legislation enacted by the states of Connecticut and Massachusetts constitutes a compact within the meaning

of the Compact Clause. Both states enacted virtually identical reciprocal and exclusive legislation within a six-month period between December of 1982 and June of 1983. That fact alone is sufficient to find that a compact exists. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 470 (1978). *Accord,* F. Frankfurter and J. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 735-48 (1925). Indeed, legislators in Massachusetts and Connecticut made no effort to conceal that their intentions were focused on collective efforts.

A formal meeting of representatives of the New England states was held (A162-168) to consider the question of regional interstate banking, and at that meeting the New England Committee to Study and Promote Regional Interstate Banking was formed (A161). In addition, the sponsor of the Massachusetts statute testified at hearings on regional interstate banking held in Connecticut and Rhode Island. Given the enactment by these states of reciprocal legislation within such a short time period, and the consistent cooperation between Massachusetts and Connecticut on this matter, there can be no question that a compact exists. (*See also, Virginia* v. *Tennessee,* 148 U.S. at 517-18, where the Court held that the terms "agreement" or "compact" as used in the Compact Clause are "sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects . . . ").

The only remaining issue is whether the New England Compact is a compact which requires the consent of Congress. In *Virginia* v. *Tennessee,* 148 U.S. at 518,* this

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* *Virginia* v. *Tennessee* involved a boundary dispute in which the Court exercised original jurisdiction. There, Justice Field enumerated

(footnote continued on following page)

Court posited two types of compacts:

1. [T]hose . . . to which the United States can have no possible objection or have any interest in interfering with, ...

2. [T]hose which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

Compacts in the first category do not require congressional approval, whereas compacts belonging to the latter category do—that is, compacts "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States"—require the consent of Congress. *Id.* at 519.

This Court continues to apply Justice Field's formulation in determining when Congressional approval of a compact between states is required. Recently, in *U.S. Steel Corp.* v. *Multistate Tax Commission,* this Court reviewed

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(footnote continued from preceding page)

four detailed examples of interstate cooperation that would not require congressional approval. These examples consist of the following:

(1) an agreement between States for one to acquire a parcel of land within the borders of another State;

(2) an agreement between two States for one to ship merchandise over a canal owned by the other;

(3) an agreement between two States to jointly drain a malarius disease producing district on the border between two States;

(4) an agreement between two States to unite to combat an invasion or epidemic.

148 U.S. at 518.

the Multistate Tax Compact, which was not approved by Congress, but was agreed to by 21 states. The principal purpose of that compact was to create a uniform and compatible mechanism for taxing interstate business. This Court held that Congressional approval was unnecessary.

In finding that the Multistate Tax Compact did not interfere with federal supremacy, the Court looked at both the amount of federal involvement in the subject covered by the compact and the result or effect of the compact on states which did not join. *Id.* at 473-78. First, the Court found that there was not a substantial federal involvement in the area of taxation of interstate business. *Id.* at 474-76. Second, the Court held that because all non-member states were free to join and there was no undue economic pressure to join, the sovereign rights of non-member states were not impaired. *Id.* at 478.

Unlike the compact involved in *U.S. Steel,* the New England Compact requires congressional approval because of the significant amount of federal involvement in the subject area and the effect of the compact on the sovereign rights of excluded states, such as New York. First, the federal government, in establishing the elaborate federal apparatus for the regulation of bank holding companies (including the requirement of federal approval of all acquisitions of banks by bank holding companies), has since 1956 exhibited a profound interest in the entire field of bank holding company regulation.

The New England Compact, in fact, also directly conflicts with a recent Act of Congress, thus making the potential for interference with federal supremacy almost a certainty. This Court noted in *U.S. Steel* that *potential* conflict is as pertinent to the inquiry of federal involvement as is actual conflict. 434 U.S. at 472.

The Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C. § 1823(f) (Supp. 1983), provides that the Federal Deposit Insurance Company (FDIC) shall arrange acquisitions by out-of-state holding companies of financially threatened or closed banking institutions having assets over $500,000,000. The statute further directs the FDIC in authorizing such acquisitions to consider the following priorities:

> (i) First, between depository institutions of the same type within the same State;
>
> (ii) Second, between depository institutions of the same type in different States;
>
> (iii) Third, between depository institutions of different types in the same State;
>
> (iv) Fourth, between depository institutions of different types in different States;
>
> In considering offers from different States, the Corporation shall give a priority to offers from adjoining States.

12 U.S.C. § 1823(f)(6)(B)—(C).

A comparison of the Garn-St Germain Act with the New England Compact illustrates the potential for direct encroachment upon federal supremacy. For example, the FDIC might decide to arrange a merger between two like institutions, one located in New York and one located in Connecticut. Despite strong federal approval for such a merger, it would be specifically prohibited by the New England Compact.

Second, the New England Compact has a decidedly adverse impact on the sovereign rights of excluded states, and particularly those of New York. For example, unlike the compact at issue in *U.S. Steel,* all states outside New

England are prohibited from having their banks compete in the New England market. Even though New York has enacted national reciprocal legislation, it cannot join the New England Compact and its banks may not acquire New England banks. Moreover, by virtue of the New England Compact created by the Connecticut statute, *no* New England bank wishing to acquire a bank in Connecticut is permitted to merge, acquire or establish a bank in New York, or it will automatically lose its status as a New England bank. It is highly unlikely, therefore, that if this compact survives, any New England bank will ever seek to acquire or establish a bank in New York, even though New York may wish to permit such an acquisition under New York law and even though New Yorkers might benefit from it.*

Contrary to this Court's directive in *U.S. Steel,* the Second Circuit failed to attach any weight whatsoever to the fact that the New England Compact adversely affects the rights and interests of non-member sister states. It simply ignored the threat the Compact creates to an area of great economic significance to New York and other non-member states. And, it failed to address whether the compact impairs sovereign rights of non-member states frustrating their rights under the Douglas Amendment to permit New England banks to acquire banks in their states.

In sum, given the overriding federal interest in the free flow of interstate commerce and in the regulation of bank holding companies, it is plain that the New England Com-

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* It is significant to note too that petitioners Northeast Bank Corp., a New England bank holding company, and its banking subsidiary, Union Trust Co., are the primary opponents of the New England Compact. Their attempt to remain competitive with the larger New England banks, by merging with a New York bank, is being thwarted by the Compact.

pact is the type of compact which requires congressional consent and is invalid until such approval is provided.

B. The New England Compact Violates The Commerce Clause

There is little question that the Connecticut and Massachusetts statutes are openly protectionist, anti-competitive and a substantial burden on interstate commerce.* The Second Circuit correctly observed in this case that such state laws violate the Commerce Clause absent "clear congressional authorization" (A30). However, that court then erred when it found such authorization in Section 3(d) of the Bank Holding Company Act—the so-called Douglas Amendment (A 31).

The decision of the court below does not elaborate on the basis for this finding. Indeed, some uncertainty about its holding is apparent from the fact that the court expressed it as a "belief":

> "We believe that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here." (A 31). (Emphasis added).

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* When a state restrains commerce in a manner that is openly protectionist, this Court has applied a *per se* rule of unconstitutionality. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). Where the burden imposed by a state is an even handed and incidental one necessitated by a legitimate local concern, a balancing test is employed and the statute held constitutional only if the burden imposed on interstate commerce is not disproportionate to the local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The New England Compact fails both tests. A more blatantly protectionist scheme could hardly be imagined. Moreover, as the Federal Reserve Board found, "there are less restrictive means than a discriminatory geographic restriction to accomplish the objectives" of the Connecticut and Massachusetts legislatures (A60).

The language of the Douglas Amendment falls far short of supporting the Second Circuit's "belief" that Congress intended to authorize states to discriminate against their sister states, as Massachusetts and Connecticut have done. This Court has observed that the object of the Douglas Amendment was much narrower:

> "Preliminarily, it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (Emphasis in original; footnote omitted).

Nor does the scant legislative history of the Douglas Amendment evince any congressional intent to authorize discriminatory regional alliances. As the court below noted, at the time the amendment was enacted no state permitted its banks to be acquired by foreign state bank holding companies (A 28). Thus, in the words of Senator Douglas, the effect of the amendment would be "to bar the expansion of bank holding companies across State lines" while permitting States "to make explicit provision for such purchases and acquisitions if they so decided." (A 28-29).

Moreover, Senator Douglas modelled his amendment on the McFadden Act,* legislation which clearly evinces a

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* "What our amended aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act . . ." 102 Cong. Rec. 6858 (1956) (A28)

congressional intent to encourage rather than restrict competitive equality among banks. The McFadden Act* was a response to the inherent competitive tension where state and national banks coexist in the same area. It permitted national banks to establish branches only if state banks could do likewise under state law. The proponents of the McFadden Act were not concerned with the effect that the local state laws would have upon interstate commerce. They were concerned only with the effect the Act might have upon state laws that gave state-chartered banks a competitive advantage over national banks within their borders. Representative McFadden characterized his bill as one which was intended to establish "competitive equality" among *"all members* of the Federal Reserve System." 68 Cong. Rec. 5815 (1927) (emphasis added).

Senator Douglas assuredly did not intend by his amendment to create a mechanism for each state to abandon the established national policy of competitive equality in favor of that state's self-serving bank scheme. Rather, his aim undoubtedly was to enable individual states to allow expansion within a national banking system which would have otherwise prohibited *all* acquisitions by out-of-state bank holding companies.

The scheme devised by Massachusetts and Connecticut is inimical to the vision of free and unencumbered interstate commerce held by the Framers of the Constitution. When Congress enacted the Douglas Amendment, it did not envision that states would use the authority given to

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* While the legislative history of the Douglas Amendment is sparse, the legislative history of the McFadden Act is detailed and has been described by this Court. *See First National Bank* v. *Walker,* 385 U.S. 252 (1966); *First National Bank* v. *Dickson,* 396 U.S. 12 (1969).

them to create regional protectionist schemes that unduly burden interstate commerce. Absent clear and unequivocal congressional authorization, the New England Compact must fall.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the Connecticut and Massachusetts statutes should be declared unconstitutional.

Dated: New York, New York
February 21, 1985

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